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No. 97-391

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden; TEENA FARMON, Warden of the Central California Women's Facility; C.A. TERHUNE, Director, California Department of Corrections; DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

TROY A. ASHMUS, of himself as an individual and on behalf of himself and all others similarly situated, *Respondent*.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

DANIEL E. LUNGREN
Attorney General of the
State of California
GEORGE WILLIAMSON
Chief Assistant Attorney General
RONALD A. BASS
Senior Assistant Attorney General
DANE R. GILLETTE
Senior Assistant Attorney General

RONALD S. MATTHIAS
Supervising Deputy Attorney General
Counsel of Record
50 Fremont St., Room 300
San Francisco, CA 94105
Telephone: (415) 356-6244
Fax: (415) 356-6486
Counsel for Petitioners

(CAPITAL CASE)

QUESTIONS PRESENTED

A California death row inmate brought this class action suit against state officials, challenging their view that California's mechanism for appointing and compensating state collateral counsel in capital cases satisfies the criteria established in Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Without addressing the Eleventh Amendment, the District Court allowed the suit, concluded that California's mechanism does not qualify under Chapter 154, and issued a statewide injunction barring California officials from contending otherwise in any proceeding involving any class member. Disagreeing with *Booth v. Maryland*, 112 F.3d 139 (CA4 1997), petition for cert. filed, Aug. 14, 1997 (No. 97-5623), the Ninth Circuit concluded that the inmate's suit was authorized under the *Ex Parte Young* doctrine because it "identif[ied] a continuing or impending violation of federal law" by state officials, and affirmed. The questions presented are:

1. Does the Eleventh Amendment bar coercive suits that seek to prevent state officials from advocating their views on disputed issues of law that will arise and be adjudicated in the regular course of habeas litigation?

2. Does an injunction barring one party from seeking favorable judicial rulings on disputed questions of law and procedure constitute an impermissible viewpoint-specific prior restraint on lawful advocacy?

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OPINIONS BELOW

The opinion of the Court of Appeals, Pet. App. 1a-24a, is reported at 123 F.3d 1199 (CA9 1997). The opinion of the District Court, Pet. App. 25a-80a, is reported at 935 F. Supp. 1048 (ND Cal. 1996).

JURISDICTION

The Court of Appeals entered its judgment on August 18, 1997. Pet. App. 1a. The petition for a writ of

certiorari was filed on September 5, 1997, and was granted on December 5, 1997. J.A. 58. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eleventh Amendment to the Constitution of the United States provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

Enacted as Title I, section 107, of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 214 (AEDPA), new Chapter 154 of Title 28 institutes adjudicative reforms for federal habeas corpus review of capital judgments from states with qualifying mechanisms for appointing and compensating state collateral counsel. Seeking to block application of those reforms to the federal judiciary's review of California capital judgments, a death row inmate brought this class action against state officials for preemptive declaratory

and injunctive relief. Filed the same day the AEDPA was signed into law and Chapter 154 became effective, the inmate's complaint styled this suit a "civil rights" action "brought pursuant to 42 U.S.C. §1983," and purported to invoke the jurisdiction of the district court under 28 U.S.C. §§1343(a)(3), (4) (civil rights) and 1331 (federal question); equitable relief was sought pursuant to 28 U.S.C. §§1343(a)(3), 2201, and 2202. J.A. 2-3, 6, 18.

Without addressing state officials' claim of Eleventh Amendment immunity from such a suit, the District Court allowed it go forward, concluded that California's collateral review procedures do not include a qualifying mechanism under Chapter 154, and issued a statewide injunction barring state officials from advocating otherwise in any legal proceedings involving death row inmates. Pet. App. 25a-80a. In a 2-1 decision, the Ninth Circuit affirmed, rejecting the Eleventh Amendment immunity claim with a finding that the inmates, by challenging the state's "announced intention" to urge application of Chapter 154 in the federal courts, had "identif[ied] a continuing or impending violation of federal law" by state officials. *Id.*, at 1a, 9a-13a. The Ninth Circuit also rejected state officials' claim that the injunction constituted an impermissible restraint on their right and duty to engage in lawful advocacy on behalf of the state's interests. *Id.*, at 21a. Judge Beezer dissented, having concluded that the suit was barred by the Eleventh Amendment. *Id.*, at 22a-24a.

A. Chapter 154

Chapter 154 implements wide-ranging reforms relating to federal habeas corpus review of state capital judgments "with special rules favorable to the state party, but applicable only if the State meets certain conditions, including provision for appointment of postconviction counsel in state proceedings." *Lindh v. Murphy,* 117 S.Ct.

2059, 2063 (1997). More particularly, in order to qualify, a state that authorizes death row inmates to present collateral claims in the course of direct appellate review, see generally 28 U.S.C. §2265(a) ("unitary review"), must "establish[] by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel" incurred in connection with collateral claims, and such rule of court or statute must "provide standards of competency for the appointment of such counsel"; the state's mechanism must also include an "offer of counsel" (and such counsel must be someone other than the inmate's trial attorney, unless both "expressly request continued representation") and "entry of an order" providing appointment to eligible inmates "upon a finding that the prisoner is indigent and has accepted the offer." See generally 28 U.S.C. §§ 2261, 2265. Congress expressly made Chapter 154 applicable "to cases pending on or after the date of enactment," *i.e.,* April 24, 1996. 110 Stat. 1226.

B. The Parties

Troy A. Ashmus is a California prisoner whose state capital judgment and sentence were affirmed in 1991, *People v. Ashmus*, 54 Cal. 3d 932, 2 Cal. Rptr. 2d 112, 820 P.2d 214 (1991), cert. denied, 506 U.S. 841, reh'g denied, 506 U.S. 1015 (1992). Although he had been provided counsel to pursue state collateral review, he never did so; instead, in 1993, he sought and obtained appointment of counsel to represent him in federal collateral proceedings. See Pet. App. 26a. His death judgment having been effectively stayed since then, Ashmus eventually filed a federal habeas petition in April of 1997 (one year after he initiated this separate civil suit against state officials), but his habeas proceedings are now being held in a state of

indefinite "abeyance" pending the District Court's "identif-[ication]" of unexhausted claims. *Ashmus v. Calderon*, 977 F. Supp. 987, 988 and n. 3, 992 and n. 11, 995 (ND Cal. 1997).

Wardens Calderon and Farmon and Director Terhune are California correctional officials who, having custody of the state's death row population, are typically named as respondents in capital habeas proceedings initiated in federal court. See generally 28 U.S.C. §2254 Rule 2(c) and App.

Attorney General Lungren is the state's chief law officer; it is his constitutional duty to "see that the laws of the state are uniformly and adequately enforced." Cal. Const., art. 5, §13. He is also the state's principal legal counsel, commanded by the legislature to "prosecute and defend all causes to which the State, or any State officer is a party in his official capacity . . . ," including, of course, federal habeas corpus proceedings. Cal. Gov't. Code §§ 12500-12512.

About one year before passage of the AEDPA, Attorney General Lungren testified before the Judiciary Committee of the United States Senate, where he praised Chapter 154 for "accomodat[ing] unitary review states like California where appellate courts can consider concurrently the direct appeal and post-conviction review."[1/] See Record, Doc. Nos. 6-7 (Memorandum in Support of Application for TRO, Temporary Declaratory Relief, and Preliminary Injunctive Relief 4-5 and Exh. 2 in support thereof) (testimony of Mar. 28, 1995, reproduced at 1995

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1. California has long provided offers of collateral and appellate representation to all death row inmates; has made such appointments in response to inmate request, by written order, and pursuant to published competency standards; and has statutorily guaranteed every appointed counsel a reasonable sum for compensation and necessary expenses. See generally Pet. App. 86a-120a.

WL 146423 (FDCH)). A news article dated August 9, 1995, reported that Lungren "expects" the AEDPA's "streamlined procedures" to apply to all pending capital cases. See *id.* (Exh. 3) (San Francisco Daily J., Aug. 9, 1995, at 1).

C. Proceedings Below

The provocation for this suit, according to Ashmus, occurred when state officials publicly "indicated their belief" that Chapter 154 would govern federal review of California death judgments. Record, Doc. No. 6, pp. 4-5 (Memorandum in Support of Application for TRO). The suit's ostensible purpose, he explained, was to secure "a judicial determination" and "guidance" respecting the application of Chapter 154. J.A. 4-5. Claiming fears of "uncertainty" in that regard, *id.*, at 4, and anticipating that state officials would, unless restrained, argue the new law's applicability before federal judges, Ashmus originally styled his suit a "civil rights" action, but later recast its scope by characterizing state officials' expected conduct as a form of illegal "enforcement" actionable under *Ex Parte Young*, 209 U.S. 123 (1908). J.A. 2; compare Record, Doc. No. 6, pp. 4-5, with Record, Doc. No. 18, pp. 4-5 (Reply to Opposition to Application for TRO); *id.*, Doc. No. 30, pp. 4-8 (Reply to Memorandum in Opposition to Preliminary Injunction).[2] (Later still, Ashmus would

2. Though filed as a class action on behalf of every death row inmate in California, the complaint identified just one of the inmates by name—Mr. Ashmus, whose counsel filed a notice "relating" the suit, for purposes of judicial assignment, see No. Dist. Cal. Local R. 3-12, to his then-nascent habeas proceeding. Record, Doc. No. 9 (Notice of Related Case); see also *Ashmus v. Calderon*, 977 F. Supp., at 988 n. 3, 995. In a separate notice, Ashmus acknowledged that "some or all of the approximately 150 other cases in federal courts challenging California death judgments" might present issues concerning applicability of the AEDPA, but he claimed to be "unaware of any other action—habeas or otherwise—in which resolution of the issues raised by this case can be determined as quickly, efficiently, and thoroughly as will be accomplished in this case." Record, Doc. No. 4 (Notice of Pendency of Other Action). In fact, before the District Court in this case had even issued its TRO, the Chief Judge of the Eastern District of California had applied provisions of Chapter 154, see *Williams v. Calderon*, 83 F.3d 281, 283 (CA9 1996), and briefing on that same point had already been requested in at least one other pending case. See Record, Doc. No. 16, p. 2 (Defendants' Notice and Reply to Ashmus's Notice of Pendency and Exhs. O, P, Q in support thereof).

argue that his suit rested on the "All Writs Act," and he even suggested that enactment of the AEDPA "impliedly" created a cause of action, independent of habeas corpus itself, authorizing him to challenge state officials' assertions, see *id.*, Doc. No. 30, p. 4 n. 1; Doc. No. 45, pp. 2-3 (Opposition to Motion to Dismiss) (citing *Davis v. Passman*, 442 U.S. 228, 238, 243 (1979)), but these theories ultimately played no part in the decisions of either the District Court or Ninth Circuit.)

The District Court granted the requested relief, first issuing a temporary restraining order which, with minor modifications, was later extended and then converted into a preliminary injunction. J.A. 20, 24, 29; Pet. App. 35a-36a, 52a-53a, 61a. While recognizing that "the responsibility and obligation for determining when Chapter 154 applies" had been "entrusted to the *federal judiciary*" (rather than state officials), the court concluded that California death row inmates "will be forced to forfeit their rights under Chapter 153 as a direct result of the uncertainty over Chapter 154's applicability created by *defendants' assertions*." Pet. App. 32a, 33a (emphases added). While also acknowledging that the propriety of Ashmus's resort to the provisions of 42 U.S.C. §1983 presented "a difficult issue of first impression," the

resolution of which "is not entirely free from doubt," the court refused to dismiss this "novel" suit, but "independent[ly]" and "addition[ally]" conferred relief under 28 U.S.C. §§2201-2202, reasoning that death row inmates "fall within the class of litigants whom Congress intended to confer rights upon via the Declaratory Judgment Act" and also "within the class of people whom Congress intended to confer rights upon under the habeas corpus provisions of Chapter 153 and 154." Pet. App. 44a-48a, 78a; see also J.A. 31, 38-43.

Although none of the court's several orders directly addressed state officials' claim that the instant suit was barred by the Eleventh Amendment, the court did respond to their oft-stated insistence that Ashmus's uncertainty concerning application of Chapter 154 should properly be resolved by appropriate motion brought in the regular course of his habeas proceedings. While acknowledging that if Ashmus had followed the course proposed by state officials,

> ". . . the Court's decision would not have directly affected other district courts' resolution of Chapter 154's applicability in California. However, plaintiff did not bring the motion as defendants would have liked. Instead, plaintiff brought this action. The Court is required to resolve the question as it in fact was presented, not as defendants wish it had been presented." Pet. App. 60a.

State officials, observing that private parties who sue states and state officers invariably become embroiled in procedural disputes concerning the proper course of their litigation, also warned the District Court that accepting the logic of Ashmus's suit would have dire implications: Each such dispute arising in the course of any pending suit would supply the basis for yet another suit against state officials to preempt them from taking whatever position the private party believes to be "wrong" and thus a

"violation" of the private party's "right" to a "correct" application of law. Supplemental Excerpt of Record on Appeal (SER) 138 (Transcript of District Court Proceedings). The court responded:

> "[State officials] have appropriately cautioned the Court that in extending well-established precedent to issues of first impression, courts should be mindful of the need to establish a principled basis on which to limit that extension. This case readily provides such a limiting principle. As the Supreme Court has repeatedly emphasized over the past two decades, *see, e.g., Gardner v. Florida*, 430 U.S. 349, 357-58 [] (1977), and as Congress' enactment of Chapter 154 vividly exemplifies, 'death is [] different.'" Pet. App. 47a-48a.

With that understanding, the court enjoined state officials as follows:

> "[D]efendants their agents, servants, employees and attorneys, and all those in active concert with them ARE HEREBY RESTRAINED AND ENJOINED from trying or seeking to obtain for the state of California the benefits of the provisions of Chapter 154 of Title 28, United States Code, in any state or federal proceeding involving any class member." *Id.*, at 76a-77a.[3]

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3. The referenced class consists of all death row inmates in California, "except those such [sic] persons whose convictions and sentences were affirmed on direct appeal prior to June 6, 1989" (that date marking the point at which, state officials have asserted, the state adopted a mechanism that would qualify under Chapter 154). Pet. App. 52a-53a, 61a. The class thus includes inmates who have invoked the habeas jurisdiction of the federal courts after having failed to obtain relief in their now-concluded state review procedures, as well as those who have yet to complete their state review.

The District Court expressly rejected state officials' constitutional objections to having their adversarial activities enjoined. While conceding that state officials "certainly have a fundamental First Amendment right to express their views" on the applicability of Chapter 154, the court suggested their rights must yield to federal injunctive power because the "manner" in which state officials expressed their views had placed death row inmates "in a very different position with respect to their habeas corpus rights than they would be if defendants had not done so." Pet. App. 35a; see generally *id.*, at 30a ("[D]efendants and their agents have consistently and vigorously maintained that California qualifies for Chapter 154's benefits . . . . "). While again acknowledging that its injunction barring state officials on a statewide basis from advocating their views on the applicability of Chapter 154 also "may constrain the ability of other co-equal district court judges to decide the issue differently," the court nonetheless reiterated its belief that it was "obligated" to act as it did. *Id.*, at 59a-60a; see *id.*, at 30a (acknowledging that the identical issue had been raised "in other cases pending before federal courts in California"); see also *id.*, at 60a (acknowledging that its decision "directly affected other district courts' resolution" of the issue). The ensuing injunction against future advocacy by state officials "in any state or federal proceeding involving any class member" thus rested on "the district court's determination that California does not comply with Chapter 154" in five respects.[4] See Pet. App. 8a-9a.

4. First, the court concluded that California's refusal to expend public funds for "fishing expeditions" to uncover "any" basis for a collateral claim, though a "sensible" limitation, is "objectively deficient" because it assertedly restricts appointed counsel to pursuing only those collateral issues "that are knowable by reference to the four corners of the appellate record." Pet. App. 65a-67a. Second, because counsel appointments do not occur "immediate[ly]" (as evidenced by the fact that many California death row inmates have requested appointment but not yet received one and will likely wait "some time" before they do), the court determined that appointments are not made "upon a finding" that inmates are indigent and have accepted the state's offer. *Id.*, at 75a. Third, the court discerned no qualifying counsel standards because their specification appears in section 20 of the Standards of Judicial Administration, which is neither a "statute" nor a "rule of court" within the meaning of the state constitution. *Id.*, at 69a-70a. Fourth, section 20's standards were deemed inadequate because they are not "binding or mandatory." *Id.*, at 70a-73a. Finally, the standards were found deficient because they make "no mention of original habeas proceedings and . . . require[] no minimum experience whatsoever in habeas proceedings." *Id.*, at 73a-74a.

By a 2-1 decision, the Ninth Circuit rejected one of the grounds on which the District Court concluded California failed to qualify, Pet. App. 19a[5], but agreed with the remaining points and affirmed. *Id.*, at 18a, 20a, 22a. As a threshold matter, the majority declined to follow the Fourth Circuit's recent decision in *Booth v. Maryland*, 112 F.3d 139 (CA4 1997), petition for cert. filed, Aug. 14, 1997 (No. 97-5623), whose teaching would have required outright dismissal of this prisoner suit under the Eleventh Amendment; instead, while expressly declining to discuss Ashmus's attempted reliance on §1983, the court determined that "the present action falls within the *Ex Parte Young* exception, and the Eleventh Amendment does not bar this suit" because the plaintiff class had "identifi[ed] a continuing or impending violation of federal law," as follows:

5. The Court of Appeals rejected the District Court's determination that California's published counsel standards were "inadequate under Chapter 154 because [they do] not require appointed counsel to have familiarity with habeas corpus litigation." Pet. App. 19a; see generally *ante*, note 4. The Ninth Circuit's rejection, however, was not based on the fact Congress had imposed no such "requirement," but on that court's own "reluctan[ce]" to do so. Pet. App. 19a.

"They have demonstrated that California's announced intention to invoke Chapter 154 without having complied with that Chapter's opt-in requirements (as we discuss later in this opinion) threatens to violate their right to federal review of their habeas petitions, pursuant to Chapter 153 of Title 28, and their right to assistance of counsel, pursuant to 21 U.S.C. §848(q). Chapter 153 provides for a thorough federal review of a petitioner's first habeas petition. Section 848(q) 'grants indigent capital defendants a mandatory right to qualified legal counsel and related services in any federal post conviction proceeding.' *McFarland v. Scott*, 114 S. Ct. 2568, 2571 (1994) (internal quotations and footnote omitted)." Pet. App. 9a-10a.

After observing that many death row inmates in California have long awaited appointment of state counsel, the majority concluded that

"By stating its intention to invoke Chapter 154 once a federal habeas petition is filed, the State is forcing the condemned inmates to make an unacceptable choice between two options, leading to the deprivation of federal review of their petitions. The State's announced intention forces a condemned inmate without counsel to decide whether to immediately file a bare bones habeas petition, with no assurance that the district court later will allow an amendment; or to await the appointment of counsel and, consequently, fail to file a petition within the 180-day period.

"Making this choice is not a matter of litigation strategy. It is a matter of life and death. If the condemned prisoner chooses to await the appointment of counsel and not file a bare bones petition within the 180-day period, he runs the risk that his initial petition will be deemed a successive petition subject to

restrictive federal review. The downside of choosing this option is so severe there is little likelihood a prisoner will choose it. The risk is simply too great.

If the prisoner chooses the first option and files a bare bones petition within the 180-day time limit of Chapter 154, in all likelihood he will have to do so without the assistance of counsel. In this circumstance, he will have little hope of identifying violations of his federal constitutional rights which may have occurred in state court." *Id.*, at 10a-11a (footnote omitted); see also *id.*, at 20a ("California cannot take advantage of the six-months limitations period when it takes years to appoint counsel").

"It is no answer," the court continued,

"to say that a district court might allow the condemned prisoner to amend his bare bones petition. A district court might not allow the amendment. *See* 28 U.S.C. §2266(b)(3)(B) (prohibiting amendment after answer is filed unless petitioner demonstrates amendment is not an abuse of the writ). Should this happen, the prisoner will be stuck with what most likely will be a losing first petition; and when that petition gets denied any subsequent petition filed with the assistance of counsel will be subject to the restrictive review accorded successive petitions. If he loses on his successive petition, he will die." *Id.*, at 11a-12a.

The Ninth Circuit made no finding that questions concerning the applicability of Chapter 154 would escape resolution unless it allowed Ashmus's lawsuit to go forward; to the contrary, without acknowledging that a demonstrated need for bringing suit under *Ex Parte Young* is one of the preconditions to doing so, the court noted that the prisoners could test their understanding of the law against state officials' competing assertions by litigating

those disputes in the course of any habeas proceedings in which they arise. Indeed, it was that state of affairs that caused the majority to see "little, if any" difference in "impact on the State's sovereign interests" between, on the one hand, having the state litigate the issue by motion in habeas proceedings and, on the other hand, forcing state officials to defend their conduct in a separate *Ex Parte Young* action. Pet. App. 12a. Either way, the majority observed, California would be "haled into federal court to determine whether it qualifies under Chapter 154." *Ibid.* The Ninth Circuit concluded that allowing this separate suit actually protects the state's sovereignty interests and promotes "efficiency and fairness" by reducing delay, saving tax dollars, and eliminating any potential that "divergent district court opinions could occur." *Id.*, at 13a (citing *Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028, 2038-2040 (1997) (principal opinion of Kennedy, J., joined by Rehnquist, C.J.)); *Booth v. Maryland*, 940 F. Supp. 849, 852 n. 3 (D. Md. 1996), rev'd, 112 F.3d 139 (CA4 1997)). Unlike the District Court, the Ninth Circuit did not embrace the proposition that "death is different" as a basis for restricting the scope of its decision allowing Ashmus's suit, nor did it identify any alternative "limiting principle" of its own.

Finally, the Ninth Circuit agreed with the District Court that its injunction was "necessary to effectuate its declaratory judgment." Pet. App. 20a. "Had the district court not issued the injunction," the court observed, "California would have been *free to assert* in other federal and state proceedings the same position it asserts in this case." *Ibid.* (emphasis added). Indeed, despite the injunction's "direct[]" impact on established adjudicatory procedures and the capacity of other courts "to decide the issue differently," it did not, according to the Ninth Circuit, impinge on state officials' First Amendment rights to

advocate defensively against collateral attacks waged upon the state's criminal judgments:

> "The injunction does not interfere with the state officials' free speech rights. They are free to voice their opinion that the district court, and we, are wrong. The officials, however, may not seek to invoke the opt-in benefits of Chapter 154 in litigation arising under the current state of California law in cases similar to the present case after the district court and this court have determined that the State has not complied with Chapter 154's opt-in requirements." Pet. App. 21a.

Judge Beezer dissented, having been "persuaded by the opinion in *Booth* that the prisoners here have wholly failed to defeat California's immunity defense." Pet. App. 23a. He concluded that "'[t]his action,' like the inmate suit in *Booth*,

> "'fails to satisfy the requirements of *Ex Parte Young*. Neither the invocation of a Chapter 154 defense, nor the announced intention to assert such a defense, nor the failure to comply with chapter 154 constitutes a continuing violation of federal law. Under these circumstances, we find no authorization in *Ex Parte Young* for abrogating Maryland's Eleventh Amendment immunity. Since injunctive relief is not available in this case under *Ex Parte Young*, declaratory relief is not available either . . . .'" *Id.*, at 23a (quoting *Booth*, 112 F.3d at 144 (citing *Green v. Mansour*, 474 U.S. 64, 74 (1985))).

State officials filed a petition for writ of certiorari seeking review of the Ninth Circuit's determinations (i) that the inmate's suit was not barred, (ii) that the district court's injunction is not unconstitutional, and (iii) that California's mechanism for collateral review of claims by death row inmates does not comport with Chapter 154.

The Court granted certiorari limited to the first two questions. 522 U.S. ___ (1997).

SUMMARY OF ARGUMENT

Lawsuits by private parties over matters of governmental prerogative are indignities from which states and state officials are generally protected by the Eleventh Amendment. The *Ex Parte Young* doctrine provides a narrow exception to this general rule for suits undertaken "to end a continuing violation of federal law." *Green v. Mansour*, 474 U.S. 64, 68 (1985). But "*Young*'s applicability has been tailored to conform as precisely as possible to those specific situations in which it is '*necessary* to permit the federal courts to vindicate federal rights and hold state officials responsible to "the supreme authority of the United States."'" *Papasan v. Allain*, 478 U.S. 265, 277 (1986) (citations omitted) (emphasis added).

This lawsuit is wholly *un*necessary. Even Ashmus now concedes that his purpose in bringing it—to alleviate, by means of "a judicial determination," his "uncertainty over application of Chapter 154"—could be accomplished, and "properly" so, in "individual habeas proceedings." Brief in Opposition 7. A plethora of reported cases conclusively demonstrates the truth of that proposition, and the District Court, which inexplicably declared itself "required" to entertain the issue in the manner Ashmus had selected, never concluded otherwise. The Ninth Circuit expressly acknowledged that death row inmates can test their understanding of Chapter 154's applicability against state officials' competing assertions by litigating those disputes in the course of habeas proceedings, but the court wholly overlooked the constitutional significance of that fact. Pet. App. 12a. Thus, in a decision that does nothing less than turn "'[t]he principles of federalism that

inform Eleventh Amendment doctrine" on their head, *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (citations omitted), the Ninth Circuit actually went on to use the conceded *availability* of a prescribed course of redress—a feature of the law that, properly understood, *secures* the state's sovereign immunity from suit under the Eleventh Amendment—as a basis for *defeating* that immunity.

It is precisely because determining the applicability of Chapter 154 is a task that "Congress . . . entrusted to the *federal judiciary*," Pet. App. 33a (emphasis added), that any actual "enforcement" of Chapter 154 will be provided by the federal courts—not by either party, and most certainly not by state officials alone. For these same reasons, state officials do not "violate" Ashmus's federal "rights" by failing to agree with his preferred understanding of federal law or by letting him know that they plan to share their differing views with the federal courts. Quite to the contrary, it is the adversarial process itself—the process by which both parties "assert" their differing views—that provides definition to their dispute and thereby facilitates, rather than impedes, the task of "judicial determination." Ashmus's access to judicial process to resolve his uncertainty having never been impaired by anyone, he had no warrant to sue state officials under *Ex Parte Young*.

In the end, Ashmus's suit is worse than unnecessary; it is destructive of the concerns for federalism and comity that Congress took into consideration when formulating the permissible contours of federal habeas corpus litigation. See generally *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1132-1133 (1996). Indeed, even if the *Ex Parte Young* doctrine were extended to allow a separate suit to litigate the application of Chapter 154, that suit could not properly be employed—as Ashmus has used it—to *circumvent* the array of procedural limitations

attendant to the habeas corpus scheme. See also *id.*, at 1182-1183) ("[T]hat a state prisoner may circumvent [habeas] restrictions by ostensibly bringing his suit under *Young* rather than 28 U.S.C. §2254 . . . cannot be the law") (Souter, J., dissenting, joined by Ginsburg and Breyer, JJ.).

Further compounding the damage to constitutional values occasioned by Ashmus's suit itself is the "remedy" fashioned below: a content-based, viewpoint-specific prior restraint on state officials' First Amendment rights to engage in lawful advocacy, rights that are essential to the effective functioning of our adversarial system. Such an unprecedented injunction is an affront to "the well-tested principle that truth—as well as fairness—is "'best discovered by powerful statements on both sides of the question.'" *Penson v. Ohio*, 488 U.S. 74, 84 (1988).

Courts, like other arms of government, have "no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Indeed, because "[i]njunctions . . . carry greater risks of censorship and discriminatory application than do ordinances," they are subject to heightened scrutiny: Even a content-*neutral* injunction will be struck down unless it "burden[s] no more speech than necessary to serve a significant government interest." *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 765 (1994).

The injunction issued in this case bans legal advocacy in the very fora where legal advocacy is expected to flourish: our nation's courts. Such an infringement on constitutional freedoms cannot be justified by one court's desire to avoid future decisions "divergent" from its own. *All* courts can be equally expected to reject legal arguments when that course is required or appropriate. But "thwarting the development of important questions of law

by freezing the first final decision rendered on a particular legal issue," *United States v. Mendoza*, 464 U.S. 154, 160 (1984), will rarely serve the interests of justice. The injustice in doing so in this case is manifest: Chapter 154's application in California is, at the very least, an issue over which reasonable minds might differ, and about which even Ashmus himself confessed "uncertainty." The analyses employed by the District Court and Ninth Circuit alike to resolve that question are patently flawed, and thus, were it not for the injunction, the risk of "divergent opinions" would be substantial, indeed. But as useful and appropriate as injunctions might be in other circumstances, our constitution forbids their use for the benighted purpose of permanently insulating judicial error from those regular legal processes by which it can be identified, scrutinized, and ultimately corrected.

The First and Eleventh Amendments require that the judgment be vacated and the suit dismissed.

ARGUMENT

I.

ASHMUS'S SUIT IS BARRED BY THE ELEVENTH AMENDMENT

The Eleventh Amendment "'is an explicit limitation on the judicial power of the United States.'" *Pennhurst State School & Hosp. v. Halderman*, 465 U.S., at 119. It bars "any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The Amendment recognizes "that each State is a sovereign entity in our federal system," *Seminole Tribe*, 116 S. Ct., at 1122, and "effectively confers an immunity from

suit." *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993).

"The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *In re Ayers*, 123 U.S. 443, 505 (1887). Accordingly, "a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief." *Pennhurst*, 465 U.S., at 101; *id.*, at 114, n. 25 ("To say that injunctive relief against State officials acting in their official capacity does not run against the State is to resort to . . . fictions"); *Cory v. White*, 457 U.S. 85, 90 (1982) ("It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought"); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 350 (1945) ("The Eleventh Amendment bars a suit against state officials when 'the state is the real, substantial party in interest'"); accord, *Coeur d'Alene Tribe*, 117 S. Ct., at 2034.

But "the Eleventh Amendment is not in all cases a bar to federal court interference with individual state officers alleged to have acted in violation of federal law." *Arkansas v. Farm Credit Services of Central Arkansas*, 117 S. Ct. 1776, 1780 (1997). This Court's decision in *Ex Parte Young*, 209 U.S. 123, created an exception to Eleventh Amendment immunity: the *Young* doctrine confers "federal jurisdiction over a suit against a state official when that suit seeks only prospective relief in order to 'end a continuing violation of federal law.'" *Seminole Tribe*, 116 S. Ct., at 1132 (citing *Green v. Mansour*, 474 U.S., at 68). The exception is a narrow one, however. *Puerto Rico Aqueduct*, 506 U.S., at 146. Indeed, "*Young's* applicability has been tailored to conform as precisely as possible to those specific situations in which it is 'necessary to permit the federal courts to vindicate federal rights and

hold state officials responsible to "the supreme authority of the United States."'" *Papasan v. Allain*, 478 U.S., at 277 (quoting *Pennhurst*, 465 U.S., at 105 (quoting *Young*, 209 U.S., at 160)). Accordingly, where essential "access to the courts" is not otherwise foreclosed to those who feel threatened by state officials' conduct, and the lawfulness of that conduct is thus subject to timely judicial scrutiny before it can have the injurious consequences the alleged victims would attribute to it, *Ex Parte Young* supplies no authorization for preemptive suits against state officials. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 217-218 (1994) (distinguishing *Ex Parte Young*); see also *Reisman v. Caplin*, 375 U.S. 440, 446-450 (1964) (same).

Congress, of course, can also abrogate Eleventh Amendment immunity and authorize suits against states or state officials that would otherwise be barred, provided that it "unequivocally expresses its intent" to do so and acts "pursuant to a valid exercise of power." *Green v. Mansour*, 474 U.S., at 68, *Pennhurst*, 465 U.S., at 99. More particularly, "through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore . . . §5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment." *Seminole Tribe*, 116 S. Ct., at 1125; *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

A. The Declaratory Judgment Act Effects No Congressional Abrogation of Eleventh Amendment Immunity

The district court ordered relief on authority of both (1) the Declaratory Judgment Act and its enforcement provision, 28 U.S.C. §§2201-2202, and (2) the Civil Rights Act, 42 U.S.C. §1983, although it acknowledged that Ashmus's theory of "rights-violation" was "novel" and the

"cognizability" of his suit under §1983 "not entirely free from doubt." Pet. App. 43a-48a, 76a-78a. The Ninth Circuit likewise construed Ashmus's complaint to contain "a 'claim' or 'cause of action' under the federal Declaratory Judgment Act, 28 U.S.C. §2201, and under 42 U.S.C. §1983," but expressly declined to address whether Ashmus had properly invoked the latter provision. Pet. App. 14a, 21a.

Assuming *arguendo* that the Declaratory Judgment Act, as a general matter, actually creates some free-standing "cause of action," rather than a form of accelerated remedy,[6] Congress, by enacting that provision, manifested no intent—much less an "unequivocally expressed intent"—to effect wholesale abrogation of the Eleventh Amendment. As this Court stated in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), "A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." *Id.*, at 246; see also *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786, n. 4 (1991) ("The fact that Congress grants jurisdiction to hear a claim does not suffice to show Congress has abrogated all defenses to that claim"). Nor, of course, is there any valid "power" reposed in Congress pursuant to which it could have indiscriminately exposed states and state officials to *every* suit for declaratory judgment. See *Fitzpatrick v. Bitzer*, 427 U.S., at 456; see also *Seminole Tribe*, 116 S. Ct.,

6. Jurisdiction, cause of action, and relief or remedy (as well as standing) are, of course, different things. See *Davis v. Passman*, 442 U.S., at 240, n. 18; *Wilton v. Seven Falls Co.*, 515 U.S. 277, 289 (1995) (referring to "the declaratory judgment *remedy*," which had been sought in that case to determine whether an insurer's refusal to defend or indemnify would constitute a breach of contract) (emphasis added); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 ("The operation of the Declaratory Judgment Act is procedural only"); 28 U.S.C. §2201 ("Creation of remedy") (caption).

at 1124 ("[T]he relief sought by a plaintiff suing a state is irrelevant to . . . whether the suit is barred by the Eleventh Amendment").

B. The *Ex Parte Young* Doctrine is Inapplicable Because Adherence to Federal Habeas Corpus Law is Accomplished by *Judicial* Rulings, and State Officials Neither "Violate" Nor "Enforce" Federal Law by Advocating their Understanding of Federal Law to a Federal Court

There plainly being no blanket congressional abrogation of Eleventh Amendment immunity from a suit as extraordinary as the one Ashmus brought here, the Ninth Circuit struggled to justify it under the doctrine of *Ex Parte Young*. But in concluding that "the *Ex Parte Young* exception applies," Pet. App. 9a-13a, the court committed two crucial errors in analysis: First, it mischaracterized state officials' mere assertions about the applicability of Chapter 154 as "violations" of federal law. Next, while recognizing that Ashmus's suit was not necessary to prevent the "violations" of law it hypothesized, the court failed to appreciate that the *Ex Parte Young* doctrine was, for that very reason, inapplicable. To demonstrate the full extent of the Ninth Circuit's errors of analysis, we begin by briefly reviewing the *Ex Parte Young* decision itself, and the circumstances in which that case arose.

1. *The* Ex Parte Young *Doctrine authorizes suits against state officials when necessary to vindicate the "supreme authority of the United States"*

In 1906 and 1907, the Minnesota legislature enacted a series of laws that imposed maximum rate and tariff schedules on the railroad industry. Shareholders of one railroad hoped to challenge the rates as unconstitutionally

confiscatory, but efforts by the railroad to mount such a challenge were thwarted by yet another unconstitutional feature of the Minnesota law: If the railroad complied with law, it forfeited any possibility of having the law subjected to judicial review; but if it violated the law to provide means for its challenge, the railroad risked enormous fines and imprisonment of company officers and employees. Such a scheme, this Court explained, "prohibited the company from seeking judicial construction of laws which deeply affects its rights" and operated "in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question . . . ." 209 U.S., at 147, 148.

Under these circumstances, this Court approved resort to an equitable action against the Minnesota Attorney General, finding

> "that individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws *of the state*, and who threaten to *commence proceedings*, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action." *Id.*, at 155-156 (emphases added).

Such a suit survives an Eleventh Amendment challenge, the Court explained, because the federal injunction barring a state official from enforcing an unconstitutional state statute "simply prohibit[s] him from doing an act which he ha[s] no legal right to do." *Id.*, at 159. The Court continued:

> "It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional. If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any *immunity from responsibility to the supreme authority of the United States*." *Id.*, at 159-160 (emphasis added).

This Court was careful to add, however, that the injunctive authority of federal courts established by its decision

> "does not include the power to restrain a[nother] court from acting in any case brought before it, either of a civil or criminal nature . . . .
>
> "The difference between the power to enjoin an individual from doing certain things, and the power to enjoin courts from proceeding in their own way to exercise jurisdiction, is plain, and no power to do the latter exists because of a power to do the former." *Id.*, at 163.

2. *The* Ex Parte Young *doctrine has no application to the "enforcement" of federal laws governing litigation of habeas corpus proceedings*

The decision in *Ex Parte Young* is of no use to Ashmus because "[t]he situation presented here is sufficiently different from that giving rise to the traditional *Ex Parte Young* action so as to preclude the availability of that doctrine." *Seminole Tribe*, 116 S. Ct., at 1132. Indeed, the differences abound.

a. *The respective roles of federal judges and state officials in federal habeas litigation*

As respondents in federal habeas corpus actions, state officials never "commence" any proceedings of any kind. Compare, *e.g., Morales v. Trans World Airlines, Inc.*, 503 U.S. 374 (1992) (observing that "*Ex Parte Young* . . . speaks of enjoining state officers 'who threaten and are about to commence proceedings'"). Rather, such proceedings are instituted by state prisoners, and state officials make their appearances in that litigation solely to protect the state's final judgments from the prisoners' collateral attacks.

Moreover, the array of defenses available to state officials in habeas suits is defined by federal cases and statutes. *E.g., Coleman v. Thompson*, 501 U.S. 722, 731-732 (procedural default); 28 U.S.C. §2254 (deference to state court disposition). Thus, when a state official "asserts" the application of Chapter 154, for example, the official "invokes" *federal* law, not any state law that might assertedly be "in conflict" with federal law.

Of course, by merely "invoking" federal law in this way, state officials perform no "enforcement" of it within the meaning of *Ex Parte Young*. Compare, *e.g., Steffel v. Thompson*, 415 U.S. 452, 454 (1974) (free speech challenge to state criminal statute, enforcement of which is accomplished through arrest and prosecution by state officials); *Morales v. Trans World Airlines, Inc.*, 503 U.S., at 381-382 (preemption challenge to state "enforcement actions" respecting regulation of airline fare advertising). The task of "enforcing" Chapter 154 (or any provision of federal habeas corpus law, for that matter) is one that "Congress has . . . entrusted to the federal *judiciary*," Pet. App. 33a (emphasis added), not to the parties, and most certainly not to state officials alone. Cf. *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 298-299 (1937) (rejecting

effort to enjoin state officials from "seek[ing] . . . a judicial determination") (distinguishing *Young*); *NAACP v. Meese*, 615 F. Supp. 200-203, and nn. 7-8, 206 (DC 1985) (rejecting effort to enjoin United States Attorney General from advancing an interpretation of *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) that is "far different and broader" than that of plaintiffs and some courts).

With "enforcement" of Chapter 154 no more falling to state officials than it does to state prisoners, neither party to habeas litigation has any basis to fear that the other's "assertions" about the subject will "close up all approaches to the court, and thus prevent any hearing upon the question." Compare 209 U.S., at 148. Quite to the contrary, it is the parties' issuance of competing "assertions" that defines the contours of the dispute, and thus serves as an implicit demand for *judicial* resolution. In this way, a federal litigant's "right" to a proper application of federal law can be neither vindicated nor "violated" by his or her adversary; rather, that power lies with the federal court, which has sole responsibility for resolving contested points of federal law. Cf. *Meese*, 615 F. Supp., at 203 and nn. 7-8. Under this adjudicative model (which is hardly unique to federal habeas corpus proceedings), both parties are afforded an equal opportunity to articulate their views, after which one party will prevail on the point and the other wili lose. The court's ruling, of course, might not necessarily be correct. But even if it is ultimately adjudged by a higher court to be wrong, the party that had prevailed under the earlier ruling inflicted no "violation" of his or her opponent's "rights"; at worst, the lower court committed an error that will have proved correctable on further review.

The unanimous decision of the Fourth Circuit in *Booth v. Maryland*, 112 F.3d 139 (CA4 1997), petition for cert. filed, Aug. 14, 1997 (No. 97-5623), succinctly states why *Ex Parte Young* is not available to an inmate like

Ashmus who seeks to prevent the state from defending its criminal judgments through reliance on legal arguments he does not like and believes to be erroneous: "Neither the invocation of a Chapter 154 defense, nor the announced intention to assert such a defense, nor the failure to comply with Chapter 154 constitutes a continuing violation of federal law." *Id.*, at 144. The Ninth Circuit erred in concluding otherwise, and by its related refusal to acknowledge that Ashmus's extraordinary suit was in no sense "necessary" either to prevent the "violation" of federal rights it mistakenly attributed to state officials or otherwise "hold [them] responsible to the 'supreme authority of the United States.'" *Papasan v. Allain*, 478 U.S. 265, 277 (1986).

To say, as did the Ninth Circuit, that Ashmus had "identif[ied] a continuing or impending violation of federal law" by characterizing state officials' "announced intention" to advocate for application of Chapter 154 as a "threat" to "deprive . . . prisoners of their rights to federal review under Chapter 153," Pet. App. 10a, 12a, is to engage in mere wordplay. This clumsily-phrased accusation against state officials—the keystone of the Ninth Circuit's *Ex Parte Young* analysis—not only assumes, *a priori*, a general "right" of litigants to be spared contestation in connection with the resolution of concededly "uncertain" legal issues, but wholly ignores the very point the Ninth Circuit's own opinion goes on to demonstrate: It is the federal *courts* themselves, not the parties before them, that select the law under which all "federal *review*" is conducted.

Likewise, there is no merit to the Ninth Circuit's accusation that the state, by dint of asserting its disagreement with death row inmates over Chapter 154's application, "forces" them "to file bare bones petitions within the 180-day time limit before counsel will have been appointed to assist them." Pet. App. 12a. The Ninth Circuit's

theory here is that the prisoner's other "option"—"awaiting] the appointment of counsel and, consequently, fail[ing] to file a petition within the 180-day period"—will risk future detriment through application of §2262(c) (providing that "[n]o Federal court thereafter shall have the authority to enter a stay of execution . . . unless the court of appeals approves the filing of a second or successive application under section 2244(b)") and possibly cause any later-filed petition itself to "be deemed a successive petition subject to restrictive federal review." Pet. App. 11a; see also *id.*, at 5a-6a. Given the "life and death stakes" of the litigation more generally, the Ninth Circuit sees this as "an unacceptable choice" that will invariably provoke the affected inmate to file within the 180-day deadline, even though that deadline is assumedly inapplicable, and "in all likelihood he will have to do so without the assistance of counsel." *Id.*, at 10a-11a. According to the Ninth Circuit, any prisoner following that course will thus suffer a violation of rights secured under Chapter 153 and 21 U.S.C. section 848(q) as follows: The opportunity to amend such a petition will become circumscribed by §2266(b)(3)(B) (providing that no amendment will be permitted after the answer is filed unless the petitioner demonstrates that the amendment is not an abuse of the writ), in which event "the prisoner will be stuck with what most likely will be a losing first petition"; in turn, "any subsequent petition filed with the assistance of counsel will be subject to the restrictive review accorded successive petitions," and, the Ninth Circuit observed, if the prisoner "loses on his successive petition, he will die." *Id.*, at 11a-12a.

The court's entire discussion of these several points rests on numerous misapprehensions of law. But even assuming the law were as the Ninth Circuit misstates it, the analysis that proceeds from that understanding is riddled with internal contradiction.

To begin with, if Chapter 154 is not applicable, then the "choice" it might otherwise present is one that no inmate will need to confront, and no amount of contrary assertions by state officials can adjudge any petition "late" by reference to an inapplicable deadline. Likewise, the consequence of filing within the 180-day period when there is no actual compulsion under Chapter 154 to do so, cannot be a bar to later amendment by operation of §2266(b)(3)(B) inasmuch as that section, also a part of Chapter 154, is, by hypothesis, just as *in*applicable.[7]

On the other hand, if Chapter 154 does apply, state officials' momentary silence on the point would not shelter prisoners from any of its consequences, including imposition of the 180-day deadline. Indeed, that deadline being precisely what Congress mandated, the "choice" it presents is one that, however "unacceptable" the Ninth Circuit might view it, prisoners will need to confront, lest Congress's mandate be altogether defeated.

Moreover, it is simply impossible for either of the consequences that made the choice seem so "unacceptable" to the Ninth Circuit—*i.e.*, denial of a stay sought in connection with the filing of first petition beyond 180 days (§ 2262(c)), or denial of amendment to an existing petition

7. The court identified no other potential detriment to "premature" filing, and none is remotely conceivable; indeed, there was no reason to assume that "premature" filing would ever need to occur: The state implored the District Court to relieve Ashmus's uncertainty by ruling on the applicability of Chapter 154's provisions "just as soon as it feels prepared to do so," and further stipulated that if Ashmus nevertheless filed his petition within the 180-day limit "out of an abundance of caution" and were only later to learn of its inapplicability, "he can always withdraw his petition and refile it within the applicable period [*i.e.*, one year, see §2244(d)(1)], augmented with whatever additions or changes he deems fitting." SER 21; Record, Doc. No. 11, p. 18 (Memorandum in Opposition to Application for TRO).

filed within 180 days (§2266(b)(3)(B))—to occur without a federal court's determination that, contrary to the Ninth Circuit's assumption, the provisions of Chapter 154 *are* applicable. In that event, state officials' early warnings to precisely that effect can scarcely constitute a "violation" of federal law, even accepting the Ninth Circuit's novel construction of that term. But it is, of course, just that peculiar construction by the Ninth Circuit that supplies the central feature of that court's larger error: its assiduous refusal to acknowledge that any "enforcement" of Chapter 154—whether by denial of a stay under §2263, or by denial of amendment under §2266, or by *any other ruling*—will necessarily be provided (or not) by a federal court, not state officials.[8]

8. Finally, by its repeated references to federal petitioners being "without counsel" or having to "await appointment" during some or all of the 180-day filing period, the Ninth Circuit appears to suggest that delay in the appointment of *federal* counsel either (1) represents some additional respect in which inmates suffer a deprivation of their federal rights at the hands of state officials, Pet. App. 10a-12a, or (2) directly demonstrates California's failure of compliance with Chapter 154, *id.*, at 20a. The Ninth Circuit is mistaken: Responsibility for the appointment of federal habeas counsel lies with the federal courts, see 21 U.S.C. §848(q), not with the states whose judgements are being attacked. And no earlier delay in the appointment of *state* counsel will cause inmates to be "without counsel" for any portion of the 180-day *federal* filing period inasmuch as that period does not even start to run until state review has run its regular course, 28 U.S.C. §2263(a), (b)(2), an event that necessarily will not occur until well after counsel is appointed to provide representation in state unitary proceedings. At any rate, the length of time it takes to appoint either state counsel or federal counsel is simply irrelevant to whether Chapter 154 will ultimately be applicable in federal proceedings.

b. *The adequacy of established procedures and the dangers of departing from them*

As noted, Ashmus himself claimed "uncertainty about the application of Chapter 154," a condition he found "unconscionable given the consequences of misjudgment and misinterpretation of the controlling law." He thus demanded a prompt "judicial determination" of the issue on which he and state officials stood divided. J.A. 4-5. Although his request for timely "guidance" under these circumstances was reasonable, the decision to initiate a second lawsuit against state officials, and to characterize their mere refusal to agree with him on a legal point as a "violation" of his federal civil rights, most certainly was not.[9]

For their part, state officials never disputed the importance of the underlying issue concerning application of Chapter 154. Accordingly, they repeatedly encouraged Ashmus to seek, and beseeched the District Court to issue, an order in his habeas proceeding providing the necessary guidance; they even reassured him they would stipulate to the issuance of a stay if he somehow found himself facing an imminent execution date and any question arising under Chapter 154 still "remained in need of resolution." See, *e.g.*, SER 20-23, 27-29, 69-70, 97-98, 130-131, 137, 145, 148-150; Record, Doc. 11, pp. 3-4; *id.*, Doc. No. 25, p. 5 (Memorandum in Opposition to Prelim-

9. In a parallel (but arguably more compelling) context, the Ninth Circuit had earlier rejected a litigant's effort to convert an alleged instance of adversarial wrongdoing committed by his opponent during the course of a pending suit into a basis for yet another suit. *Dooley v. Reiss*, 736 F.2d 1392, 1393-1395 (CA9 1984) (noting that litigation of a "parent" suit will ordinarily furnish the opportunity to address any improprieties occurring in the course of those proceedings, making any separate "sucker" suit undertaken for that same purpose unnecessary). Apparently unable to distinguish the holding in *Dooley*, Ashmus, like the Ninth Circuit, simply ignored it.

inary Injunction). While further noting that Ashmus's separately-filed action for equitable relief against state officials was barred by the Eleventh Amendment, state officials took great pains to explain that an appropriate motion filed in connection with his habeas action (as to which state officials enjoy no immunity) would also prove to be the far simpler and more expeditious method for resolving his uncertainty. SER 21-23, 27-29, 53-55, 69-70, 97-98, 137; see also Record, Doc. No. 11, pp. 6-7 and n. 2; see generally *Preiser v. Rodriguez*, 411 U.S. 475, 495-496 (comparing the "swift, flexible, and summary" attributes of habeas procedure with the procedural formalities and protraction typically associated with "an original plenary civil action"); *Booth*, 112 F.3d, at 144 (noting that it is less damaging to state sovereignty to resolve Chapter 154's applicability during habeas proceedings than to do so by entertaining yet another lawsuit); *Meese*, 615 F. Supp., at 203 (noting that motion practice provides a "far more appropriate, far more logical remedy than a [separate] lawsuit . . . seeking injunctive relief").

Ashmus could not seriously dispute the availability of the course the state urged him to follow, but see SER 6, and the adequacy of that course—as well as the utter lack of any "necessity" for pursuing the vastly more cumbersome and disruptive course he chose—is now clear beyond cavil. See authorities cited in Brief in Opposition 16 n. 10; cf., *e.g.*, *Felker v. Turpin*, 116 S. Ct. 2333 (1996) (resolving issues arising under AEDPA amendments to Chapter 153); *Lindh v. Murphy*, 117 S. Ct. 2059 (same).[10]

10. Ashmus knows this firsthand. On April 18, 1997, when he developed additional "uncertainty"—this time concerning the application of the AEDPA's amendments to Chapter *153*—he filed a motion; a mere six days later he had his answer from the District Court: The amendments will govern Ashmus's proceedings, but the new one-year filing deadline would be immediately "tolled." See 977

Even Ashmus now concedes that the "judicial determination" he sought by this suit "is one that may properly be made in individual habeas proceedings." Brief in Opposition 7. That concession alone is fatal to his attempted reliance on *Ex Parte Young* (even assuming that mere advocacy can constitute a "violation" of law), for if a separate lawsuit against state officials is not necessary to hold them responsible to "the supreme authority of the United States," then the entire basis for the *Ex Parte Young* doctrine disappears. See also *Thunder Basin Coal*, 510 U.S., at 221 (Scalia, J., concurring). The lack of any such "necessity" here is palpable.[11]

Habeas Corpus Law itself is characterized by a carefully crafted and comprehensive statutory mechanism that guarantees both effective judicial enforcement of the litigants' procedural rights and meaningful appellate oversight; its structure embodies the concerns for federalism and comity that Congress took into consideration in its formulation. See generally 28 U.S.C. §2241 et seq; see also *Lonchar v. Thomas*, 116 S. Ct. 1293 (1996). "[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex Parte Young*." *Seminole Tribe*, 116 S. Ct., at 1132. "The balance, completeness, and structural

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F. Supp., at 988, n. 3.

11. An *Ex Parte Young* action is also not needed by those inmates whose state proceedings are still pending, albeit for a somewhat different reason: Inasmuch as their state review is not completed, those inmates could yet obtain relief from the state court, and they thus have neither occasion to seek nor entitlement to secure *any* federal review under *either* Chapter 153 *or* 154. If, however, state relief should ultimately be denied, then those inmates can obtain the desired "judicial determination" in precisely the manner Ashmus concedes is available.

integrity," *Brown v. GSA*, 425 U.S. 820, 832 (1976), of habeas corpus procedures precludes their supplementation by judicial stroke. See also *Public Service Comm'n v. Wycoff Co.*, 344 U.S. 237, 246 (1952) ("[T]he declaratory judgment procedure will not be used to preempt and prejudge issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review") (emphasis added); *Green v. Mansour*, 474 U.S., at 73 (declaratory judgment not available to "end run" other rules).

Indeed, with federal habeas being a form of litigation that, even under the best of circumstances, "'intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority,'" *Duckworth v. Eagan*, 492 U.S. 195, 210 (1989) (O'Connor, J., concurring) (quoting *Harris v. Reed*, 489 U.S. 255, 282 (Kennedy, J., dissenting)), there is perhaps no other context in which it would be less appropriate to indulge ad hoc, judicially-inspired departures from the procedures approved by Congress.[12] At

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12. The comprehensive remedial character of the habeas scheme would likewise preclude Ashmus's attempted resort to the provisions of 42 U.S.C. §1983. *Middlesex County Sewerage Auth. v. National Sea Clammer's Ass'n*, 453 U.S. 1, 20 (1981); *Blessing v. Firestone*, 117 S. Ct. 1353, 1359-1360 (1997). Relatedly, his "civil rights" theory would ultimately fail for substantially the same reason that also dooms his *Ex Parte Young* construct: The advocacy of one's adversary, even if erroneous, simply entails no violation of federal law, and *a fortiori*, no violation of any federal rights. See *Blessing*, *supra*, at 1359. Indeed, it is manifest that the reforms of federal habeas law provided by Chapter 154—a measure passed by "a Congress intent on expediting capital habeas cases," *Lindh*, 117 S. Ct., at 2065, and "concern[ed] with the perceived acquiescence in capital defendants' dilatory tactics by some federal courts," *id.*, at 2069 (Rehnquist, C.J., dissenting)—were not fashioned to "benefit" death row inmates, and that legislation therefore invests them with no enforceable federal rights of any sort, *Blessing, supra,* at 1361, much less does it create any

the very least, for a federal court to blithely and unnecessarily disrupt the carefully balanced structure of the habeas regimen by (i) subjecting a state to yet another entire lawsuit (rather than requiring it to argue a motion in an existing one), (ii) indulging allegations that a state's legal position amounts to a "violation" of law (rather than an arguably mistaken view of it), and (iii) dictating to a state which legal arguments it may ultimately advance in defense of its criminal judgments (rather than rejecting the ones it finds unpersuasive), and then to attempt to pass off those several indignities as events having "little, if any, impact on the State's sovereign interest,"[13] is to wholly

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additional causes of action by "implication." At any rate, by his suit Ashmus did not seek California's "compliance" with Chapter 154 (which is in no manner required by federal law); rather, he sought the "benefits" flowing from a finding that the state is in *non*-compliance.

13. In ostensible support of this remarkable characterization, the Ninth Circuit cited the principal opinion in *Coeur d'Alene Tribe*, 117 S. Ct., at 2038-2040 (opinion of Kennedy, J., joined by The Chief Justice). The Ninth Circuit apparently believes the relevant focus under *Ex Parte Young* has now shifted from whether a suit against state officials is necessary to vindicate the supremacy of federal law to whether the suit serves the federal judiciary's notion of "efficiency and fairness." This understanding will find no support in *Coeur d'Alene Tribe*. Demonstrating that an officer suit is "necessary for the vindication of federal rights," *id.*, at 2038, remains an essential element of the *Ex Parte Young* doctrine, although that showing alone might not be sufficient to sustain an officer suit if there are other "special factors counseling hesitation." *Id.*, at 2039 (quoting *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)). Of course, if the inestimable protection afforded state sovereignty under the Eleventh Amendment is ever actually offset by some other state interest of equal or greater value (such as saving "tax dollars," to take the Ninth Circuit's example), state officials can be expected to appreciate as much; in that case, immunity might appropriately be waived by the state, see *Pennhurst*, 465 U.S., at 99 (citing *Clark v. Barnard*, 108 U.S. 436, 447 (1883)), but not summarily stripped away based on a federal judge's sense of what is "'clearly'" in the state's best

ignore "'[t]he principles of federalism that inform Eleventh Amendment doctrine.'" *Pennhurst*, 465 U.S., at 100 (quoting *Hutto v. Finney*, 437 U.S. 678, 691 (1978)); see also *Ex Parte Young*, 209 U.S., at 158 ("There is no doubt that the court cannot control the exercise of the discretion of an officer"); *Rizzo v. Goode*, 423 U.S. 362, 377-378 (1976); *Meese*, 615 F. Supp., at 206. To be sure, the federal habeas corpus statute provides *one* mechanism by which a state might be "haled" into federal court, see Pet. App. 12a; but by its enactment of that statute, Congress did not grant state prisoners license to "hale" the state into federal court *in any way they like*.

Congress, we note, recently considered—but clearly rejected—the creation of a supplemental private cause of action by which death row inmates would have been authorized to contest a state's compliance with proposed reforms of federal habeas procedure. See, *e.g.*, S. 1441, 103d Cong., 1st Sess. (1993) (§8); H.R. 3131, 103d Cong., 1st Sess. (1993) (§306); 139 Cong. Rec. S 10925 (1993). Against that historical backdrop, creation of any similar cause of action by the judiciary would be most "institutional[ly] inappropriate[]." *Lonchar*, 116 S. Ct., at 1301.

Furthermore, allowing habeas petitioners to deviate from the only carefully crafted adjudicative model to receive congressional endorsement would invite equally revolutionary departures from accepted methods of resolving legal disputes that will arise in a great many other contexts wherein concerns for comity and federalism are nearly as great. This much is certain: Under Ashmus's logic (which effectively conditions state officials'

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interest. Pet. App. 13a (citing *Booth*, 940 F. Supp., at 852 n. 3, rev'd, 112 F.3d 139 (CA4 1997)). "'Policy, no matter how compelling, is insufficient, standing alone, to waive [sovereign] immunity.'" *Booth*, 112 F.3d, at 146 (quoting *Library of Congress v. Shaw*, 478 U.S. 310, 321 (1986)).

right to advocate on their ability to *prevail* in every instance), any disputed issue of federal law that arises in the course of litigation between the state and a private party will be subject to resolution, at the private party's sole option, either (1) by motion in the proceedings to which the dispute relates, or (2) by separate action under *Ex Parte Young* to establish the "right" of the private party to prevail on the point, which judgment is then enforceable by ancillary injunctive relief preventing the state from ever giving expression to its opposing view.[14]

3. *Even if* Ex Parte Young *permitted a separate suit to resolve Chapter 154's application, that suit could not be used to circumvent the procedural limitations attendant to habeas litigation*

As the Ninth Circuit recognized and Ashmus now concedes, a judicial determination of Chapter 154's applicability is attainable in individual habeas proceedings. Pet. App. 12a; Brief in Opposition 7; see also *United States v. One 1985 Cadillac Seville*, 866 F.2d 1142, 1144 (CA9 1989) (illustrating use of "motion for declaratory judgment"). Significantly, however, if Ashmus *had* followed established habeas procedures he would have faced a number of procedural limitations which no doubt displeased him.

14. Neither Ashmus nor the Ninth Circuit has identified any principled basis on which a court might limit the obvious logical implications of the novel "rights-violation" theory underlying this suit. We briefly note that the limiting principle seized upon by the District Court—Death is different—is singularly untenable. That death is different supplies the rationale for demanding, under compulsion of the Eighth Amendment, that the fact-finding process attendant to capital *sentencing* "aspire to a heightened standard of reliability," *Ford v. Wainwright*, 477 U.S. 399, 411 (1996) (plurality opinion of Marshall, J.), but it does not entitle the death row population to any special procedural dispensations in connection with their efforts to wage collateral attacks on their judgments, *Smith v. Murray*, 477 U.S. 527, 538 (1986), much less can it be invoked to bestow upon that population a judge-created civil cause of action enjoyed by no other segment of society.

First, he could not have obtained class certification because that mechanism is "ordinarily disfavored" in habeas practice, *Cox v. McCarthy*, 829 F.2d 800, 804 (CA9 1987); see generally *Schall v. Martin*, 467 U.S. 253, 261, n. 10 (1984), and, more fundamentally, because that device applies to *actions*, Fed. Rule Civ. Proc. 23, not "motions." Accordingly, any ruling adverse to the state that Ashmus alone might have obtained, even a published one, would not have precluded another district court, considering another prisoner's challenge to a California death judgment, from giving effect to its contrary view; indeed, even if a "class motion" were available,[15] a ruling in Ashmus's favor would not necessarily carry preclusive effect in other habeas cases. *Mendoza*, 464 U.S., at 159 (nonmutual offensive collateral estoppel does not operate against the federal government); *Hercules Carriers, Inc. v. Florida*, 768 F.2d 1558-1579 (CA11 1985) (extending *Mendoza* protection to the state); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979) (application of offensive collateral estoppel is discretionary); *Montana v. United States*, 44 U.S. 147, 162-164 and n. 11 (not applicable to "'unmixed questions of law' in successive actions involving substantially unrelated claims," or when "there is reason to doubt the quality, extensiveness, or fairness of procedures

15. Ashmus affirmatively resisted "coordinated or consolidated pretrial proceedings" under 28 U.S.C. §1407, see Record, Doc. No. 4, perhaps because he recognized that Chapter 154's applicability to California cases presented a common question of law rather than fact, or perhaps because assignment of proceedings under that provision would be determined by an impartial judicial panel on multidistrict litigation, §1407(b), not subject to potential manipulation by naming a single class representative plaintiff to whose habeas action the proceedings might then be "related." See Record, Doc. No. 9.

followed in prior litigation"). Finally, even a truly "binding" ruling would, at most, dictate conforming *rulings* at the district court level; it would not preclude the state from *asserting* its opposing view, if only to preserve the issue for further review. See Cal. Rule of Prof. Conduct 3-200 (recognizing propriety of making "a good faith argument for extension, modification, or reversal of . . . existing law"); compare Pet. App. 20a ("Had the district court not issued the injunction, California would have been free to assert in other federal and state proceedings the same position it asserts in this case").

It is understandable that Ashmus would prefer to avoid these several restrictions on his ability to control the course of his own litigation. But allowing him to use *Ex Parte Young* to achieve that objective was, even assuming that doctrine were not otherwise inapplicable, indisputably improper. *Seminole Tribe*, 116 S. Ct., at 1182-1183) ("[T]hat a state prisoner may circumvent [habeas] restrictions by ostensibly bringing his suit under *Young* rather than 28 U.S.C. §2254 . . . cannot be the law") (Souter, J., dissenting, joined by Ginsburg and Breyer, JJ.).

Remarkably, the District Court expressly acknowledged that its own actions in this case "may constrain" or had perhaps even already "directly affected" the "ability of other co-equal district court judges to decide the issue differently." Pet. App. 60a; see also *id*., at 30a (acknowledging that the issue of Chapter 154 applicability had been raised "in other cases pending before federal courts in California"); *id*. at 34a (referring to the "exercise [of] its equitable powers to enjoin California from *receiving* the benefits" of Chapter 154) (emphasis added). Yet that is precisely the consequence that *Ex Parte Young* prohibits by its own terms. 209 U.S., at 163 ("[T]he right to enjoin . . . a state official . . . does not include the power to restrain a court from acting in any case brought before it"); see generally *Mullis v. United States Bankruptcy Court for the*

Dist. of Nev., 828 F.2d 1385, 1392-1394 (CA9 1987) ("A district court lacks authority to issue a writ of mandamus to another district court"); *Steffel v. Thompson*, 415 U.S., at 480-482 (Rehnquist, J., concurring); cf. *Green v. Mansour*, 474 U.S., at 72-73; *Meese*, 615 F. Supp., at 202, 204-205 (refraining from conduct that "would directly affect the course of the litigation" in other district courts). That a court would attempt to achieve that improper result indirectly by enjoining state officials is profoundly disturbing; more troubling still is the discovery that a court would, in the process, also violate state officials' constitutionally-protected freedom to advocate on behalf of the state's interest in protecting its criminal judgments from collateral attacks. We now turn to the latter subject.

II.

THE INJUNCTION AGAINST STATE OFFICIALS' ADVOCACY VIOLATES THE FIRST AMENDMENT

Ours is an adversarial system, a system "premised on the well-tested principle that truth—as well as fairness—is '"best discovered by powerful statements on both sides of the question."'" *Penson v. Ohio*, 488 U.S., at 84. Essential to the effective operation of such a system is a recognition of the constitutionally-protected freedom of parties to express their views in litigation.

> "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." *Powell v. Alabama*, 287 U.S. 4569 (1932).

"The First and Fourteenth Amendments require a measure of protection for 'advocating lawful means of vindicating legal rights,'" *In re Primus*, 436 U.S. 412, 432 (1978), and a litigant's rights extend to the "use of established adjudicatory procedures," *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). See also *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

Courts, like the other arms of government, have "no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S., at 95. "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which the truth will ultimately prevail, ..." *Red Lion Broadcasting Co., v. FCC*, 395 U.S. 367 (1969). "To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees." *City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175-176 (1976). Indeed, because "[i]njunctions . . . carry greater risks of censorship and discriminatory application than do ordinances," they are subject to heightened scrutiny: Even a content-*neutral* injunction will be struck down unless it "burden[s] no more speech than necessary to serve a significant government interest." *Madsen v. Women's Health Center, Inc.*, 512 U.S., at 765.

Here, of course, the injunction issued by the District Court and upheld by the Ninth Circuit is anything but "content-neutral": It bars state officials from addressing a particular subject—the application of Chapter 154. Such a regulation "on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648-649 (1984). Even worse, it restricts state officials' speech on that subject in a viewpoint-specific manner: "Had the district

court not issued the injunction, California would have been free to assert in other federal and state proceedings [its] position" that it has complied with those statutory preconditions which entitle it to have Chapter 154 applied; that same injunction, however, leaves state prisoners free to express their contrary view in any court they like—that is, "[i]t excludes one advocate from a forum to which adversaries have unlimited access." *Bolger v. Youngs Drug Product Corp.*, 464 U.S. 60, 84 (1983) (Stevens, J., concurring in the judgment). An injunction of such scope—and having such disparate impact, intentionally so, on participants in the adversarial process—is unprecedented in the annals of American law. And the arguments and rationalizations that have been offered in its defense cannot withstand even minimal scrutiny.

Certainly, one cannot plausibly validate a complete denial of state officials' opportunity to advocate their position "in litigation"—the only context in which legal advocacy could have any effect—by observing that they are "free to voice their opinion" elsewhere. See Pet. App. 21a. "One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 163 (1939). Explaining *outside* the litigation context "that the district court, and [Ninth Circuit], are wrong," *ibid.*, can vindicate none of the state officials' expressive freedoms, for "'[f]ree trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." *NAACP v. Button*, 371 U.S. 415, 437 (1963). "Under our constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact." *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 513 (1969).

Nor can state officials' "fundamental First Amendment right to express their views in th[at] regard" be

curtailed on the theory that "the *manner* in which they have done so has put plaintiffs in a very different position with respect to their habeas corpus rights than they would be if defendants had not done so." Pet. App. 35a (emphasis added). Viewpoints that are "consistently and vigorously maintained," *id.*, at 30a, enjoy as much constitutional protection as those expressed with less fervor. See *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) (cross burning); *Cohen v. California*, 403 U.S. 15 (1971) (display of expletive in courthouse). And the degree of protection afforded to the expression of views can no more turn on their content than on the extent to which an adversary perceives their expression to cause "uncertainty" or any other form of discomfort, including being "put . . . in a very different position" from what might have been the case if the speaker had expressed no opinion or some different opinion more to the audience's liking. See *Boos v. Barry*, 485 U.S. 312, 321 (1988). Certainly, the government's "urgent wish to avoid controversy which might result from . . . expression" provides no basis for suppressing that expression. *Tinker*, 393 U.S., at 510. Indeed, it would be a curious jurisprudence that offers First Amendment protection to flag burners, cross burners, and those who enter courthouses wearing jackets emblazoned with profanity, but denies it to state officials who, in defending presumptively valid criminal convictions from collateral attacks, seek to share with the federal courts their views on a question of federal law.

Our constitution also will not permit one court's fear of another court's "divergent" opinion to defeat a litigant's right to advocate its position. See Pet. App. 13a. Entertaining parties' competing requests for favorable rulings on issues of law is not "basically incompatible with the normal activity" of courts, *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972), and if a court's ultimate ruling happens

to "diverge" from an earlier one issued by some different court, it does not "inherently threaten[] the judicial process," *Cox v. Louisiana*, 379 U.S. 559, 566 (1965). See also *Riley*, 302 U.S., at 299. If ever the state of the law truly compels rejection of a legal proposition, our courts can be expected to act in accordance with the law's command; however, for one court to suggest that it needs to shelter all other courts from even *hearing* advocacy *it* believes to be "erroneous," lest those other courts succumb to the temptation to "err" in their rulings, is to demean the judicial process itself. Quite simply, no branch of government has authority to "effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). In addition to being a content-based, viewpoint-specific restriction on protected expression, a one-sided ban on advocacy that serves to "avoid" divergent opinions "in any state or federal proceedings," Pet. App. 3a, 13a, is an impermissible prior restraint of First Amendment freedoms as well. *City of Madison*, 429 U.S., at 177; see *Madsen*, 512 U.S., at 763 n. 2. And putting its unconstitutionality to one side, such an injunction can only have disastrous consequences for the *quality* of the judicial decisionmaking process.

"[T]horough development of legal doctrine," we think, is best accomplished "by allowing litigation in multiple forums." *Mendoza*, 464 U.S., at 163. Indeed, "the need for adversary inquiry is increased by the complexity of the issues presented for adjudication . . . ." *Alderman v. United States*, 394 U.S. 165, 184 (1969). Rarely will "thwarting the development of important questions of law by freezing the first final decision rendered on a particular legal issue" be a prudent approach, *Mendoza*, at 160; and following that disfavored course when, as here, initial resolution of the issue occurred "under severe time constraints," Pet. App. 22a, will only enhance the risk of

serious adjudicative error, as this case so vividly illustrates: Had the Ninth Circuit not been spared the distracting effects of "divergent district court opinions," *id.*, at 13a, it might have realized, for example, that state officials are not the agency that selects the law under which "federal *review* of . . . habeas petitions" occurs, *id.*, at 10a, and thus ordered these proceedings terminated under compulsion of the Eleventh Amendment; alternatively, and assuming the Ninth Circuit were otherwise determined to reach the question of Chapter 154's application, the court's resolution might not have proceeded on the wholly erroneous assumptions that states appoint counsel for federal proceedings, that Chapter 154 contains a deadline for the appointment of state counsel, or that delays in the appointment of state counsel will cause prisoners to be "without counsel" during any portion of the 180-day filing deadline for federal petitions, to take just three more examples.

Congress mandated that Chapter 154 go into effect immediately. For the sake of avoiding "divergence," however, the instant injunction has effectively blocked the implementation of Chapter 154 in California since its enactment. That there was ever any risk of "divergent" opinions, of course, simply shows that Chapter 154's application in California is, at the very least, an issue over which reasonable minds might differ. Ashmus's own confessions of "uncertainty" about his position only confirm the point. And the reason the prospect of "divergence" would endure to this day—were it not for the injunction—is distressingly clear: Grave and multiple errors (only a few of which we have touched upon at this stage) infect the decisions of the District Court and Ninth Circuit alike. Whatever the value of injunctions in other contexts, the constitution forbids their use for the benighted purpose of permanently insulating judicial error from

those regular legal processes by which it can be identified, scrutinized, and ultimately corrected.

CONCLUSION

The judgment of the Court of Appeals should be vacated and the case remanded to that court with directions that the action be dismissed by the District Court.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of the
State of California
GEORGE WILLIAMSON
Chief Assistant Attorney General
RONALD A. BASS
Senior Assistant Attorney General
DANE R. GILLETTE
Senior Assistant Attorney General

RONALD S. MATTHIAS
Supervising Deputy Attorney General
Counsel of Record

Counsel for Petitioners

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